

Commission's rules (the "Spectrum Cap") prohibits an entity from having an attributable interest in a total of more than 45 Mhz of CMRS spectrum licensed for cellular, broadband PCS, and Specialized Mobile Radio with significant overlap in any geographic area.⁸⁹ Stock ownership is not attributable, however, unless it amounts to 20 percent or more of the equity or voting stock of the CMRS licensee in the service area, or otherwise constitutes control of the licensee.

Because MediaOne's interest in Vodafone is far below the 20 percent attribution level, the proposed Merger will not cause AT&T to violate the Commission's Spectrum Cap. Moreover, MediaOne's interest in Vodafone's CMRS systems has been brought below five percent; MediaOne exercises no control or influence over the domestic operations of Vodafone, and is not involved in the management of Vodafone or its CMRS operations. In fact, MediaOne has "monetized" most of its stockholdings in Vodafone, further reducing any real interest in its CMRS operations.⁹⁰ Given the level of MediaOne's equity interest in Vodafone and its compliance with the Spectrum Cap, no competitive CMRS issues are raised by the proposed Merger.⁹¹

(... Continued)

Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205 (FCC Dec. 10, 1998) ("*CMRS Spectrum Cap NPRM*").

⁸⁹ 47 C.F.R. § 20.6(a). Significant overlap of a PCS and cellular service area is defined as a ten percent population overlap. *Id.* § 20.6(c)(1).

⁹⁰ A "monetization" is a transaction that permits a company to capture the value of the gains of an appreciated asset, such as common stock of another company that it owns, while deferring the capital gains that would accompany an outright sale. MediaOne has monetized more than two-thirds of its Vodafone shares and it is in the process of monetizing the remaining shares. Thus, while MediaOne continues to own these Vodafone shares, much of the economic interest in these shares has been transferred to other investors.

⁹¹ AT&T may require a temporary waiver of Section 22.942 of the Commission's rules if Section 22.942 remains in effect. Section 22.942, which was adopted before the Commission's allocation of spectrum for PCS, when there were only two cellular licensees in each market,
(Continued...)

E. Multichannel Video Programming Distribution

AT&T's acquisition of MediaOne will not eliminate or reduce competition in the MVPD marketplace. With very minimal exception, there is no geographic overlap between AT&T's cable systems and MediaOne's systems.⁹² Applicants currently believe that, among the territories in which both AT&T and MediaOne have authority to offer cable service, the only actual overbuilds are in discrete sections within the Atlanta, Georgia MSA (Powder Springs, Fayetteville, Fulton County and Peachtree City).⁹³ In total, it appears that fewer than 3,000

(... Continued)

prohibits an entity from having an ownership interest in licensees for both channel blocks in overlapping cellular service areas unless the interests pose no substantial threat to competition. 47 C.F.R. § 22.942. AT&T Wireless and Vodafone have interests in both channel blocks in 37 cellular service areas in California, Colorado, Idaho, Minnesota, Nevada, Oregon, Utah, and Washington.

In adopting Section 22.942, the Commission determined that interests of less than five percent would not implicate the rule in circumstances where control was not present. *Id.* § 22.942(a). MediaOne's interest in Vodafone does not convey any rights to influence, much less control, Vodafone. In addition, now that Vodafone has acquired AirTouch, MediaOne's passive investment in Vodafone still will not pose any threat to competition, much less a substantial threat. As part of its *CMRS Spectrum Cap NPRM*, the Commission is reconsidering the continued need for Section 22.942. Since Section 22.942 was adopted, the Commission has allocated an additional 120 Mhz for PCS services and adopted rules that permit SMR operators to provide CMRS services that also compete with cellular services. In such circumstances, it is difficult to reconcile the Spectrum Cap limit of 20 percent, which permits ownership in overlapping PCS and cellular systems, with a different limit that would prohibit ownership of less than a 5 percent interest in overlapping cellular systems. If a waiver is necessary, AT&T would commit to bring itself into compliance with whatever rule is adopted by the Commission in the *CMRS Spectrum Cap NPRM* proceeding.

⁹² The analysis in this section focuses on cable systems in which AT&T or MediaOne have a 50 percent or greater ownership interest.

⁹³ Other than in the Atlanta service areas, AT&T and MediaOne each hold franchises to operate cable systems in common territories within seven service areas: Riverside-San Bernardino, California; Peoria-Pekin, Illinois; Ann Arbor, Michigan; Miami, Florida; Chicago, Illinois; Kankakee, Illinois, and Lansing/E. Lansing, Michigan. However, proposed exchange transactions between AT&T and MediaOne that will eliminate the overlaps in Miami, Chicago, Kankakee, and Lansing/East Lansing have already been cleared by the antitrust authorities,

(Continued...)

homes in those franchise areas have actually been overbuilt. Given this insignificant degree of overlap, a combination of AT&T and MediaOne would have at most a *de minimis* impact on MVPD competition and clearly would pale in comparison to the substantial public interest benefits and efficiencies to be realized by the Merger, including the acceleration of local telephony competition.⁹⁴

In fact, the Merger likely will *increase* MVPD competition. By enabling AT&T to provide packaged (as well as separate) voice, video, and Internet services to millions of American consumers on an expedited basis, the Merger will increase the incentive of local telephone companies and others to compete in the provision of multichannel video services. In such an environment, ILECs and others will be motivated to upgrade their networks to enable them to provide comparable packages that include video programming as well as other types of services. Indeed, there already is evidence that AT&T's plans to provide service packages are causing ILECs to seek ways to offer multichannel video services along with their traditional telephony services. For example, both SBC and Bell Atlantic have partnered with DirecTV to

(... Continued)

pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"). The required HSR notification (Transaction No. 19990624) was filed on November 25, 1998, and the waiting period expired on December 25, 1998. Similarly, MediaOne has entered into definitive agreements for transfers to Time Warner that will eliminate overlaps with AT&T in Riverside-San Bernardino, with the exception of franchise territories in which there is no overbuild. These transfers also have received clearance under the HSR Act. The HSR notification (Transaction No. 19991719) was filed on March 1, 1999, and the waiting period terminated on March 31, 1999. The two remaining MSAs known to the parties to contain common territories – Ann Arbor, and Peoria-Pekin – contain no overbuilds.

⁹⁴ See *supra* Section IV for a discussion of the substantial public interest benefits created by the Merger.

offer bundled services to customers throughout their service areas.⁹⁵ The Merger thus should stimulate MVPD competition rather than restrain it.⁹⁶

F. Video Programming

The Merger will have no anti-competitive effects in the thriving video programming marketplace. The Merger will result in little real consolidation of programming interests, and AT&T will, in any event, remain a relatively small video programming player. Nor will the Merger create a video programming *buyer* even remotely large enough to exercise monopsony power or to engage in vertical foreclosure. Finally, the Merger will not result in the violation of any currently effective statute or rule directed at video programming concerns. Applicants recognize, of course, that horizontal cable ownership limit issues are before the Commission in two pending industry-wide proceedings. Applicants analyze below the impact of the Merger under various proposals made in those proceedings and demonstrate why such generic proposals – animated by monopsony power and vertical foreclosure concerns that simply

⁹⁵ *Bell Atlantic Introduces Television Service for Apartment, Condominium, Co-op and Townhouse Residents*, (Sep. 14, 1998) <www.ba.com/nr/1998/Sep/19980914002.html>. See also *Bell Atlantic Brings Its New TV Service to Pittsburgh, Offering Consumers an Alternative to Cable* (May 24, 1999) <www.ba.com/nr/1999/May/19990524004/html>; DirecTV Press Release, *SBC Communications, DirecTV, and USSB Sign Agreements to Offer Digital Satellite TV Service in Apartment Complexes* (Mar. 2, 1998) <www.directv.com/news/swbdeal.html>.

⁹⁶ In fact, it is important to note that, notwithstanding the increased size of various multiple systems operators ("MSOs") as a result of the mergers and clustering in the cable industry over the last few years, none of this activity has slowed the growth of cable competitors or diminished competition in the MVPD marketplace. To the contrary, MVPD competition has *increased* during this period. In part, this is because DBS operators, telephone companies, and other MVPDs are responding to the increased investment by cable MSOs in programming, additional channel capacity, and expanded network size. This evidences the true competition existing in the marketplace.

are not present here – should pose no obstacle to expeditious approval of the proposed Merger and the resulting transfer of control of FCC authorizations and licenses.

1. The Merger will have No Adverse Effects on Competition in the Provision of Video Programming

For a variety of reasons, the Merger will not significantly increase concentration in the ownership of video programming and therefore will have no adverse effects on competition in the video programming marketplace.⁹⁷

First, as shown above, the structural and operational separation between Liberty and AT&T means that the Merger does not result in a combination of the Liberty and MediaOne programming interests. To the contrary, after the Merger, the programming interests of Liberty will be controlled and managed entirely separately from the MediaOne programming interests held by AT&T.⁹⁸

Second, following the Merger, AT&T will have a purely passive 25.51 percent limited partnership interest in TWE. AT&T will have no input into the management of the TWE cable systems or the TWE programming interests.⁹⁹

Third, with regard to the remaining programming services to be combined by the Merger (except two regional programming services, New England Cable News and Fox Sports

⁹⁷ The programming interests of AT&T and MediaOne are described above in Section II.

⁹⁸ It is important to stress that AT&T's interest in Liberty, Liberty's ownership interest in Time Warner, Inc., and AT&T's interest in Cablevision/Rainbow were all before the Commission when it addressed the AT&T-TCI merger, and the Commission found no adverse competitive impact on the video programming marketplace.

⁹⁹ See *infra* Section II(B).

New England in which AT&T has a 50 percent interest), AT&T will have only a minority (in some cases very small), indirect interest, with neither control nor management rights. The combination of these interests simply is not significant enough to create a concern about a material increase in the concentration of the programming marketplace.

Fourth, competition in the video programming business is thriving. The Commission has identified 245 national satellite-delivered video services,¹⁰⁰ many of which are owned by large, well-funded, and experienced media companies, such as Disney, Viacom, and NBC. The combination of the limited programming interests held by AT&T and MediaOne will not materially affect competition in such a highly competitive and robust marketplace.

2. AT&T-MediaOne will have No Ability to Exercise Monopsony Power or Engage in Vertical Foreclosure

AT&T will have no ability, after the Merger, to engage in vertical foreclosure or to exercise monopsony power over video programming services. As an initial matter, existing and growing competition from non-cable MVPDs, which serve as alternative outlets for video programming, constrains the ability of *any* multiple system operator ("MSO") to engage in such conduct.¹⁰¹ And, post-Merger, AT&T will control programming decisions or purchase

¹⁰⁰ Fifth Annual Report, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd. 24284, ¶ 159 (Dec. 23, 1998) ("*Fifth Annual Video Competition Report*").

¹⁰¹ See generally Stanley Besen and John Woodbury, "An Economic Analysis of the FCC's Cable Ownership Restrictions," at 5 (Aug. 14, 1998) ("Besen and Woodbury") (attached to Comments of TCI, *In the Matter of Implementation of Section 11(c) of Cable Television Consumer Protection and Competition Act of 1992 – Horizontal Ownership Limits*, MM Docket No. 92-264 (Aug. 14, 1998)) ("TCI Ownership Limit Comments") ("[T]he ability to wield buyer power is diminished by the availability of alternative distribution outlets to which program suppliers can turn if a single cable operator, or a collection of operators, were to attempt to

(Continued . . .)

programming for a share of total MVPD subscribers that is far too small to support any plausible argument that AT&T could engage in such conduct.

a. Competition from alternative MVPDs constrains the ability of any MSO to engage in vertical foreclosure or exercise monopoly power

Today, consumers can choose from a variety of multichannel video providers, including DBS, telephone companies, C-Band, multichannel multipoint distribution services ("MMDS"), Satellite Master Antenna Television Systems ("SMATV"), and utilities. More than 12.5 million consumers, representing approximately 16 percent of all MVPD subscribers, now obtain multichannel video programming from some company other than their local cable operator, and more can potentially do so.¹⁰² This non-cable video competition means not only additional choices for consumers but additional outlets for video programmers, the existence of which necessarily constrains the ability of any MSO to exercise monopsony power or to engage in vertical foreclosure.¹⁰³ In the MVPD business, there are numerous actual and potential video

(... Continued)

exercise such power. In particular, the rapid growth of DBS provides program suppliers with an increasingly important alternative to cable operators for the sale of their services."); *id.* at 8 ("[T]he effectiveness of a foreclosure strategy is further weakened if other distributors can carry a rival service the MSO tried to foreclose. In light of developments that have occurred since the passage of the 1992 Cable Act and the adoption by the Commission of rules limiting the size of MSOs – especially the rapid growth in the number of subscribers served by DBS operators – this factor places an especially important constraint on the ability of a large vertically integrated MSO to foreclose a rival program service.").

¹⁰² Order and Authorization, *Tempo Satellite, Inc., Assignor and DirecTV Enterprises, Inc., Assignee*, IBFS File No. SAT-ASG-19990127-00014, (FCC May 28, 1999) ("*Tempo Authorization*").

¹⁰³ See *Fourth Annual Video Competition Report* ¶ 150 ("[a]s non-cable MVPD subscribership increases, the significance of DBS, MMDS, and SMATV operators in the MVPD purchasing (Continued ...)")

programming buyers that currently would be “at least as significant a force” as the combined AT&T-MediaOne.

The growth of cable’s competitors has been steadily increasing for several years. For example, in its 1998 annual report on the status of competition in the video marketplace, the Commission noted that the number of subscribers to non-cable MVPDs grew 18 percent between June 1997 and June 1998, while cable subscribership grew by only two percent over the same period.¹⁰⁴ Industry analysts expect this trend to continue and have estimated that the number of non-cable MVPD subscribers will reach 17.8 million, or approximately 22 percent of all MVPD subscribers, by next year.¹⁰⁵

DBS. DBS is a formidable competitor in the MVPD marketplace, offering over 200 channels that include all the most popular and widely carried national cable networks, as well as some programming (such as DirecTV’s exclusive sports packages) that is not available to local cable systems. In addition, the up-front consumer equipment costs for DBS have plummeted from \$700 five years ago to little or nothing today. As the Department of Justice has observed:

Cable and DBS are both MVPD products. While the programming services are delivered via different technologies, consumers view the services as similar and to a large degree substitutable. Indeed, most new DBS subscribers in recent years are former cable subscribers who either stopped buying cable or downgraded their cable service once they purchased a DBS system.¹⁰⁶

(... Continued)

marketplace also increases . . . thus reducing cable operators’ market power or influence in the purchase and distribution of network programming.”).

¹⁰⁴ *Fifth Annual Video Competition Report* ¶ 8.

¹⁰⁵ See, e.g., *Cablevision Bluebook, Volume IX*, at 10 (Summer/Fall 1999).

¹⁰⁶ Complaint, *United States v. Primestar, Inc.*, No. 1:98CV01193, ¶ 63 (D.D.C. May 12, 1998).

More recently, the Commission concluded, "*DBS operators and cable operators have engaged in increasingly rivalrous behavior, and . . . will likely increase the degree of that competition.*"¹⁰⁷

The following additional facts about DBS further highlight that DBS operators are a significant outlets for video programmers:

- Two out of every three new MVPD subscribers choose a DBS operator over the local cable operator as their video programming provider;¹⁰⁸
- Last year, DBS subscribership grew by 43 percent -- over 20 times faster than cable's subscribership growth during the same period;¹⁰⁹ and
- DBS operators have more subscribers than most cable companies they challenge. DirecTV (with 7.2 million subs) is now comparable in size to the third largest cable MSO; Echostar (with 2.4 million subs) is now comparable in size to the seventh largest cable MSO.

Various industry and regulatory developments will further enhance the competitive strength of DBS. First, DBS providers have begun to partner with other powerful companies in order to establish a presence in local communities and to enhance their service offerings. For example, DirecTV has signed marketing and distribution agreements with both Bell Atlantic and SBC to bundle telephone and video services to consumers.¹¹⁰ Likewise, Echostar has signed strategic partnership agreements with private cable and competitive

¹⁰⁷ Order and Authorization, *MCI Telecommunications Corp. and Echostar 110 Corp.*, FCC 99-109, ¶ 19 (FCC May 19, 1999) (emphasis added) (citing DOJ's comments filed in that proceeding) ("*Echostar Order*").

¹⁰⁸ *Fifth Annual Competition Report* ¶ 62.

¹⁰⁹ *Id.* ¶ 12.

¹¹⁰ DirecTV News Release, "SBC Communications, DirecTV and USSB Sign Agreements to Offer Digital Satellite TV Service in Apartment Complexes," March 2, 1999, <www.directv.com/news/swbdeal.html>; DirecTV News Release, "Bell Atlantic, DirecTV and USSB Announce Agreements," March 2, 1999 <www.directv.com/news/badeal.html>.

residential phone service providers to bundle Echostar's satellite programming with other services, such as Internet access, telephony, and traditional cable television.¹¹¹

Second, DirecTV recently acquired the United States Satellite Broadcasting Company ("USSB") and PRIMESTAR, which will add a significant number of new subscribers to DirecTV's totals.¹¹² More recently, the Commission approved the transfer of DBS licenses from Tempo to DirecTV, which will enable DirecTV to operate DBS satellites from three orbital locations that are capable of transmitting DBS signals to all portions of the U.S.¹¹³ Indeed, the Commission justified its approval of the Tempo transfer by stating that it will:

allow DirecTV to compete more effectively with EchoStar and cable operators [and] spur technical innovation by encouraging the satellite industry to develop small earth stations that can receive and integrate signals from multiple orbital positions, thus expanding programming choices for DBS subscribers, including under-served consumers.¹¹⁴

Similarly, the Commission noted that its approval of EchoStar's acquisition from MCI of 28 additional DBS channels at the full CONUS 110° orbital slot "will likely allow EchoStar to provide consumers with a more competitive alternative to cable offerings and thereby increase

¹¹¹ Echostar Press Release, "Echostar, OpTel Form Alliance to Provide Dish Network Satellite Television Services to Multi-Family Residential Complexes," February 2, 1999, <www.dishnetwork.com/profile/press/press/press169.html>.

¹¹² DirecTV News Release, "Hughes to Acquire PRIMESTAR," January 22, 1999, <www.directv.com/news/dtvprimestar.html>; DirecTV News Release, "Hughes Completes Acquisition of PRIMESTAR Medium-Power DBS Business," April 28, 1999, <www.directv.com/press/pressdel/0,1112,5,00.html>.

¹¹³ *See generally* Tempo Authorization.

¹¹⁴ *Id.* ¶ 6.

competition in the [MVPD] market, which should lead to additional service offerings and/or lower prices.”¹¹⁵

Finally, Congress’s ongoing legislative initiative to authorize DBS providers to retransmit local broadcast signals within the broadcaster’s local market will further enhance DBS’s competitive significance by eliminating the primary reason why people say they do not subscribe to DBS.¹¹⁶ According to information received by the Commission, 55 percent of individuals inquiring into DBS cited the lack of local broadcast signals as a reason not to purchase DBS.¹¹⁷

ILECs. Ameritech now passes more than 1.7 million homes in Illinois, Michigan, Ohio, and Wisconsin with over 100 cable franchises.¹¹⁸ BellSouth has cable franchises passing 1.2 million homes in parts of the Atlanta, Birmingham, Charleston, and Jacksonville

¹¹⁵ *Echostar Order* ¶ 1.

¹¹⁶ Both the House and Senate have approved bills that would allow satellite carriers to retransmit a local television station to households and businesses throughout that station’s local market, as cable providers do currently. The House bill, H.R. 1554, was approved in April, and the Senate bill, S. 247, was adopted in May. The House and Senate are expected to complete work on the legislation later this summer. Given the pending enactment of this legislation, DirecTV announced plans to offer local broadcast network channels to approximately 50 million homes across the U.S. DirecTV Press Release, *DirecTV Announces Record April Subscriber Growth* (May 12, 1999) <www.directv.com/news/aprilperf.html>. The Commission has also paved the way for direct competition for domestic MVPD service by permitting DBS providers in Mexico and Argentina to provide service in the United States. See Public Notice, *International Bureau Announced Conclusion of U.S.-Mexico Protocol for Direct-to-Home Satellite Services*, 12 FCC Rcd. 13105 (1996); Public Notice, *International Bureau Announces Conclusion of U.S.-Argentina Framework Agreement and Protocol for Direct-to-Home Satellite Services and Fixed-Satellite Services*, DA 98-1114 (FCC June 12, 1998).

¹¹⁷ *Fifth Annual Video Competition Report* ¶ 63.

¹¹⁸ *ANM Launches in Two Ohio Towns*, Multichannel News, at 22 (May 17, 1999). Ameritech bills itself as the nation’s largest competitive cable operator.

metropolitan areas,¹¹⁹ and is a large investor in multichannel multipoint distribution services MMDS.¹²⁰ GTE has cable franchises in California, Florida, and Hawaii, that pass over 500,000 homes.¹²¹ SNET has acquired the first state-wide cable franchise in Connecticut and is offering cable service in over a dozen communities.¹²² U S West operates video systems in Omaha, Nebraska, and Phoenix, Arizona, the latter representing the first use of very high-speed digital subscriber line ("VDSL") technology to deliver video, high-speed Internet access, and telephone service over existing copper plant.¹²³

In fact, the efforts of AT&T and other cable companies to upgrade and expand their networks are actually increasing the level of MVPD competition, as telephone companies seek to respond to cable's deployment of broadband technology and services. As explained in more detail below in Section V(G), ILECs are rapidly deploying DSL to provide a wide range of bundled broadband services to consumers.

Utilities. Electric utilities are entering the cable business. For example, RCN Corporation now provides bundled phone, video, and Internet-access services in New York, Boston, New Jersey, and Pennsylvania. It already has at least 63,000 video customers in Manhattan and Boston and recently expanded its cable service to Queens. RCN has also built a \$300-million, 350-

¹¹⁹ *Fifth Annual Video Competition Report* ¶ 114. Other sources indicate that BellSouth passed 1.2 million households as early as August, 1997. See *Wireless Ops Oppose Nets' Program Access*, Multichannel News, at 35 (Aug. 25, 1997).

¹²⁰ *Fifth Annual Video Competition Report* ¶ 112.

¹²¹ *Does GTE Provide Cable TV?* <www.gte.com/products/prods/americast.html>.

¹²² *Fifth Annual Video Competition Report* ¶ 43.

¹²³ *Id.* ¶ 114.

mile fiber network in the Washington, D.C. region with a local utility, Potomac Electric Power Company, and is already providing similar bundled services under the brand name "StarPower" in the nation's capital.¹²⁴ Similarly, Seren Innovations Inc., a subsidiary of Northern States Power Co., Minnesota's largest electrical and natural gas utility, has begun offering cable and Internet service in Minnesota and has applied for cable franchises in markets served by AT&T in California and Colorado.¹²⁵

Non-Cable MVPDs. While DBS and the delivery of services by telephone companies show the most growth as competitive alternatives to traditional cable companies, other MVPD providers also offer direct competition to cable operators in the MVPD marketplace. For example, C-band distributors serve over 1.8 million subscribers and provide access to several hundred program services.

Moreover, the provision of an additional 6 Mhz of spectrum to local broadcasters to launch digital broadcasting services will "allow broadcasters to become more effective competitors with cable operators in the MVPD market."¹²⁶ In fact, as early as November 1, 1999, more than half of all television households will have access to multiple channels of digital broadcast television.¹²⁷ By combining the digital spectrum of all stations in a local television

¹²⁴ *Id.* ¶ 12.

¹²⁵ *Overbuilder Seren Could Stir Things In Denver*, Multichannel News, at 48 (June 7, 1999).

¹²⁶ *Id.* ¶ 101.

¹²⁷ Notice of Proposed Rulemaking, *Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement, and Construction of Broadcast Station Transmission Facilities*, 12 FCC Rcd. 12504, ¶ 2 (1997).

market, broadcasters estimate that they will be able to create a 40 to 50 channel service to compete with existing MVPDs.¹²⁸

In addition, MMDS operators currently serve approximately 1.5 million subscribers, and the Commission reports that the number of homes capable of receiving an MMDS signal grew to 34,000,000 at the end of 1997, an increase of 8 percent over the previous year.¹²⁹ Various companies are already taking advantage of the Commission's recent authorization of two-way digital MMDS¹³⁰ to offer high-speed Internet access, video conferencing, distance learning, continuing education, and other two-way services.¹³¹ As noted by the Commission, its recent *Two-Way Order* provides MMDS operators with greater flexibility to provide service, which will further enhance MMDS' competitive potential.¹³²

SMATV also compete aggressively with cable operators, primarily for multiple dwelling units. There are approximately 1.5 million SMATV subscribers.¹³³ New technological advancements, such as the use of common carrier supertrunking and the integration of DBS and

¹²⁸ *Fifth Annual Video Competition Report* ¶ 101.

¹²⁹ *Id.* ¶ 83.

¹³⁰ Report and Order, *Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, 13 FCC Rcd. 19112 (1998) ("*Two Way Order*").

¹³¹ For example, BellSouth and GTE both launched digital MMDS systems in their regions in direct competition with cable operators. *Fifth Annual Video Competition Report* ¶ 81. Once all systems are launched, BellSouth estimates that it will be able to service more than three million homes. BellSouth News Release, *BellSouth Brings New Era of Home Entertainment Service to Atlanta* (June 4, 1998) <www.bellsouthcorp.com/proactive/documents/render/1726.html>.

¹³² *Two Way Order* ¶¶ 8-9.

¹³³ *Fifth Annual Video Competition Report* ¶ 90.

SMATV services, will likely foster additional growth in the SMATV industry. SMATV operators also have begun to bundle local and long distance residential telephone services, closed-circuit security monitoring, Internet access, voice mail, and paging services in order to increase their competitive position *vis-à-vis* cable and other MVPDs.¹³⁴

* * *

The emergence and development of DBS and other significant competitors to cable means that programmers now have meaningful alternative outlets for distributing their product. The presence of these alternatives, and the fact that they are growing much more rapidly than cable, necessarily reduces any MSO's power to foreclose rivals or to obtain unfair concessions from programmers. As the Commission recently observed, "[w]ith the growth of alternative MVPDs, network programmers gain alternative avenues for distribution of their products, thus reducing cable operators' market power or influence in the purchase and distribution of network programming."¹³⁵

b. AT&T-MediaOne will control far too few distribution outlets to engage in vertical foreclosure or exercise monopsony power

In analyzing the ability of an MSO to foreclose rival program services or to obtain anticompetitive concessions from programmers, the only relevant systems are those for which the MSO controls programming choices or buys programming. If an MSO cannot force a cable

¹³⁴ *Id.*

¹³⁵ Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking, *In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 - Horizontal Ownership Limits*, 13 FCC Rcd. 14462, ¶ 80 (1998) ("*Further NPRM*") (emphasis added).

system to decline to carry a rival program service, then the system is irrelevant to that MSO's ability to pursue a vertical foreclosure strategy. Similarly, an MSO derives no power to force anticompetitive concessions from a programmer based on a cable system for which it does not purchase programming, even if the MSO has a minority interest in the system.

After the Merger, AT&T will be involved to some extent in the purchasing or selection of programming for cable systems with approximately 21,206,000 subscribers. This includes all the subscribers for the AT&T and MediaOne cable systems identified in the charts contained in Appendices A and B, with the exception of those for which AT&T does not currently, and will not post-Merger, purchase programming or participate in making programming choices – *i.e.*, Cablevision, the two AT&T-Time Warner joint ventures (Kansas City Cable Partners and Texas Cable Partners, L.P., and TWE).¹³⁶ Based on a conservatively low estimated total MVPD subscriber base of 79,600,000,¹³⁷ AT&T thus would purchasing programming or participate in making programming choices for 26.6 percent of current MVPD subscribers.

¹³⁶ Also, AT&T has subtracted 735,000 subscribers to account for systems that will be transferred to Comcast upon consummation of the Merger with MediaOne.

¹³⁷ *Tempo Authorization* ¶ 13. AT&T believes that using 79,600,000 MVPD subscribers is conservative. For example, Donaldson, Lufkin, Jenrette ("DLJ") recently estimated that there were 82,074,000 MVPD subscribers. See *Cablevision Blue Book, Volume IX*, at 10 (Summer/Fall 1999). Moreover, both the Commission and DLJ estimates are based on subscriber counts from last year, a significant fact given the growth rates for DBS and other non-cable MVPDs cited above. By way of example, consider that the Commission released its *Fifth Annual Competition Report* in December 1998, estimating 76.6 million MVPD subscribers, and only five months later, in the *Tempo Authorization*, adjusted that estimate to 79,600,000, an increase of three million subscribers.

Moreover, AT&T recently entered into three transactions that will further reduce its subscriber count: 1) the sale of its interest in Falcon Communications, L.P.; 2) the reduction below five percent of its interest in the cable systems currently owned by Bresnan Communications Co., Ltd. Partnership; and 3) the sale of its interests in certain cable systems to Cox Communications, Inc. When these transactions are completed, AT&T's subscriber count will be reduced to approximately 18,886,000 or only 23.7 percent of current MVPD subscribers. Similarly, Comcast, separate from the Comcast Exchange discussed above, has an option to acquire additional cable systems from AT&T. If Comcast exercises that option, then AT&T's percentage of MVPD subscribers would be even further reduced.

Even assuming that one could legitimately define a video programming input "market" limited to MVPDs – and, as discussed below, video programmers, in fact, have many other outlets for their products – there could be no conceivable monopsony power or vertical foreclosure concern at these levels. If AT&T refused to carry (or offered only anticompetitive purchase terms) to a video programmer, the programmer would still be able to obtain carriage on other cable systems serving "over 50 million subscribers, well over the threshold for national success."¹³⁸ AT&T has previously demonstrated that many programming services have had success with far fewer subscribers.¹³⁹ In fact, the Commission has recognized that networks can achieve long-term success with only 15 to 20 million subscribers.¹⁴⁰ The video programmer

¹³⁸ *Further NPRM* ¶ 45.

¹³⁹ *See TCI Ownership Limit Comments* at 75-78.

¹⁴⁰ *See Fourth Annual Video Competition Report* ¶¶ 155, 165. Also, in the Commission's closed captioning proceeding, new cable programmers noted that it is necessary to have 10 to 20 million subscribers in order to attract advertisers (one of the keys to long-term viability). *See Further* (Continued...)

would also retain access to the nearly 10 million subscribers currently served by DBS providers that, as noted above are already among the largest video programming purchasers. Indeed, even current AT&T subscribers would remain up for grabs through DBS providers, whose ability to capture those subscribers (by offering better content) would only be enhanced by any anticompetitive conduct by AT&T directed at video programmers. On these facts, there is no credible basis to conclude that AT&T post-Merger could foreclose rival programming services or exercise monopsony power – real world video programmers simply have too many alternatives.

Indeed, Applicants are aware of no precedent in *any* industry finding monopsony power with respect to a firm that purchases only twenty-five percent of the output of a given product. Even in cases involving concerted action by unaffiliated purchasers (and thus raising the specter of the very conspiracies in restraint of trade that the antitrust laws were designed to discourage), the Department of Justice has effectively established a “safe harbor” against monopsony power challenges when the firms in question account for less than 35 percent of total purchases, disposing of such matters through routine “Business Review” letters.¹⁴¹ In the few

(... Continued)

NPRM ¶ 44 (citing comments of Outdoor Life Network, Speedvision Network, The Golf Channel, BET on Jazz, and America’s Health Network).

¹⁴¹ See, e.g., *Business Travel Contractors Corporation*, 1995 DOJBRL LEXIS 9 (July 14, 1995) (declining to challenge the plans of a Pennsylvania business travel corporation (“BTTC”) to form a joint buying group to negotiate domestic air travel fares, finding that “[s]o long as BTTC’s customers do not account for more than 35 percent of air travel purchases over any city-pair market, it is unlikely that BTTC would be able to exercise monopsony power to negotiate fares that are below competitive levels”); *IFA Shippers’ Association*, 1990 DOJBRL LEXIS 2 (April 1990); see also *Utilities Service Alliance*, 1996 DOJBRL LEXIS 4 (July 3, 1996) (the Department “would challenge the formation or operation of a shippers’ association that is likely to result in the exercise of power over freight rates in any relevant market (‘monopsony power’), but “[t]his is unlikely where the membership’s total projected shipments are less than 35 percent of the total transportation services supplied.”).

single firm monopsony cases, the courts have consistently found that even much higher shares raise no competitive concerns, particularly where, as here, the sellers are sophisticated, large corporations. For example, in *United States v. Syufy Enterprises*, the court affirmed a summary judgment rejection of claims that a movie theatre chain that, during the relevant period, controlled as much as 75 percent of the Las Vegas market for first-run films was exercising monopsony power over Hollywood film distributors.¹⁴² The same recognition that very high share is necessary to support any plausible claim is reflected in the vertical foreclosure cases as well (which have arisen primarily in the monopoly, not monopsony, context). See, e.g., *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945) (“[I]t is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not”).¹⁴³

Here, moreover, the approximately 25 percent share of current MVPD subscribers vastly overstates AT&T’s post-Merger position with respect to video programmers. The entities that provide the overwhelming amount of video programming are large, sophisticated corporations that exercise substantial selling power through their control of unique, highly differentiated products. The very existence of MSOs and other MVPDs depends on obtaining

¹⁴² 903 F.2d 659, 663-71 (9th Cir. 1990). See also Jacobson & Dorman, *Monopsony Revisited*, Antitrust Bulletin 165 (Spring 1992) (“[T]he evidence is strong that true monopsony power is rare and that net adverse effects on price and output from monopsony are even rarer”).

¹⁴³ See also *Arthur S. Langenderfer v. S. E. Johnson Co.*, 917 F.2d 1413, 1432 (6th Cir. 1991) (“[I]t would be rare indeed to find a firm with only 25 percent or 50 percent of the market could control price over any significant period.”); I Antitrust Law Developments (Third), 213-214 (1992) (citations omitted) (“A market share in excess of 70 percent is almost always deemed sufficient to support an inference of monopoly power, although that inference may be overcome by other evidence. In contrast, a market share of less than about 40 percent virtually precludes a finding of monopoly power”); Areeda and Hovenkamp, ANTITRUST LAW 548-549 (1992 Supp.) (“[T]here is substantial merit in a presumption that market shares below 50 or 60 percent do not constitute monopoly power.”).

programming that subscribers are willing to pay to receive. And now that over 95 percent of all television households have access to at least two to three competing MVPDs, cable systems must acquire the programming that their customers demand or they will lose subscribership to DBS and other competing MVPDs.¹⁴⁴ Nor are video programmers limited to selling their products to MVPDs. To the contrary, video programming service suppliers have many other outlets for their products, including broadcast, home video, and international markets.

Concerns that AT&T (or other MSOs) could impair the programming marketplace through vertical foreclosure are misplaced for additional reasons as well. Such conduct is already largely foreclosed by existing regulations, such as the program access, program carriage, must carry, leased access, and channel occupancy rules, which already prohibit discrimination and require the carriage of programming from diverse sources.¹⁴⁵ Further, it is important to recognize that TCI has previously supplied *empirical evidence* that it “does not favor affiliated programming services in any way that significantly forecloses non-affiliated programming.”¹⁴⁶ Finally, AT&T would have no incentive to attempt vertical foreclosure even if it had the ability

¹⁴⁴ *Tempo Authorization* ¶ 16. The substantial bargaining power that programmers enjoy by virtue of their exclusive control over popular programming networks and services is perhaps most aptly illustrated by the acceptance by even the largest cable MSOs of a 20 percent rate increase in the licensing fees charged by ESPN. Despite concerns that subscribers would not be willing to absorb this increase, the vast majority of large cable operators and cable MSOs retained ESPN. *See Id.* ¶ 174.

¹⁴⁵ The Commission has recognized that because these rules “all affect the way the cable television industry currently operates and have a profound effect on current industry structure and performance,” it is appropriate “to consider the impact of these provisions in alleviating some of the public interest and anticompetitive concerns about horizontal concentration.” *Further NPRM* ¶ 50. Moreover, these other behavioral restrictions have proven successful and, in some cases, have been strengthened since adoption of the suspended horizontal limit. *See TCI Ownership Limit Comments* at 21-25.

¹⁴⁶ Besen and Woodbury at A-1 *supra* n.101.

to do so. Any vertical foreclosure benefit to existing AT&T programming interests would not go to AT&T shareholders, but would go to Liberty shareholders. MediaOne's programming interests are virtually all minority interests, and thus, any gains to these new AT&T programming interests also would flow primarily to others. Yet AT&T would bear all of the substantial costs of the vertical foreclosure strategy – *i.e.*, reduced subscriber revenues that would flow from the reduced quality of its offerings occasioned by denying subscribers access to popular rival programming services.

In short, there is no basis for concluding that the Merger will give AT&T the ability to exercise monopsony power or to engage in vertical foreclosure.

3. The Commission's Suspended Horizontal Cable Ownership Rules, however they are Ultimately Resolved, should Not be an Obstacle to the Merger

AT&T recognizes that even beyond its competitive interest analysis, the Commission has an independent duty to assess the impact of a proposed transfer of control on the transferee's compliance with statutes and Commission regulations, including those addressing the ownership of cable systems. As the Commission is aware, however, the statutory cable horizontal ownership provision has been held unconstitutional,¹⁴⁷ and the Commission's cable horizontal ownership rule has been stayed.¹⁴⁸ Thus, the Merger currently would not result in a violation of the statute or the Commission's rule.

¹⁴⁷ *Daniels Cablevision, Inc. v. U.S.*, 835 F. Supp. 1 (D.D.C. 1993).

¹⁴⁸ 1993 Ownership Order ¶ 10. The stay of the notification provisions of the horizontal rule has been lifted, and AT&T has been complying with those requirements.

AT&T understands, of course, that the decision finding the statutory horizontal ownership provision unconstitutional is under appeal and that the Commission has initiated the *Further NPRM* on the horizontal rules and a related *NPRM* on the cable attribution rules.¹⁴⁹ AT&T will comply with all Commission rules. Regardless of the Commission's approval of the Merger, AT&T acknowledges that it will be subject to the general rules established in the ongoing rulemaking proceeding that is the subject of reconsideration and appellate review. While AT&T has supported the proposition that the Merger will not have anticompetitive effects on video programming services,¹⁵⁰ if, under rules the Commission adopts, AT&T exceeds the permitted level of horizontal ownership, it will either obtain an appropriate waiver based on the benefits to competition that will not otherwise be achieved, or bring itself into compliance with the rules.

With regard to the suspended cable horizontal ownership limit, AT&T and MediaOne, in the ongoing proceedings in the various rulemakings, have maintained that the

¹⁴⁹ *Notice of Proposed Rulemaking, In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Review of the Commission's Cable Attribution Rules*, 13 FCC Rcd. 12990 (1998).

¹⁵⁰ Congress enacted the horizontal limit based on the concerns that cable operators could: (1) exercise monopsony power to force unfair concessions from programmers, *see* H.R. Rep. No. 102-628, at 42-43 (1992), and (2) vertically foreclose entry by programmers, thereby reducing program diversity. *See* S. Rep. No. 102-92, at 32 (1991). As the Commission has acknowledged, the purpose of the horizontal ownership limit relates entirely to the ability of cable operators to affect video programming. *See* Second Report and Order, *In the Matter of Implementation of Sections 11 and 13 of Cable Television Consumer Protection and Competition Act of 1992 - Vertical and Horizontal Ownership Limits*, 8 FCC Rcd. 8565, ¶ 10 (1993) ("1993 Cable Ownership Order") ("Congress concluded that [the] degree of [cable] concentration, though low relative to other industries, may enable some MSOs to exercise excessive market power, or monopsony power, in the program acquisition market. Congress was concerned in particular with preventing large vertically integrated cable systems from creating barriers to entry for new video programmers, and from causing a reduction in the number of media voices available to consumers.").

Commission should take the following approach: 1) consistent with the underlying purposes of the rules, attribute to an MSO only those cable systems for which the MSO controls programming choices or purchases programming; 2) consistent with the Commission's proposal in the *Further NPRM*, measure an MSO's horizontal concentration level as a percentage of all MVPD subscribers; and 3) for the reasons set forth in *TCI's* Horizontal Ownership Comments, significantly raise the 30 percent limit. Under this approach, as described above, AT&T would be involved in programming decisions or purchase programming for 26.6 percent (or 23.7 percent after the Falcon, Bresnan and Cox transactions close) of all MVPD subscribers nationwide.¹⁵¹

If the Commission instead were to consider AT&T's post-Merger horizontal concentration level on a cable homes-passed basis, then AT&T would be involved in programming decisions or purchase programming for cable systems with approximately

¹⁵¹ AT&T and MediaOne today do not, and AT&T post-Merger will not, control programming choices or purchase programming for: Cablevision (3,149,000 subscribers; 5,126,000 homes passed); the two AT&T-Time Warner cable joint ventures (1,416,000 subscribers; 2,686,000 homes passed); and TWE (9,734,000 subscribers; 15,254,000 homes passed – after subtracting the two AT&T-Time Warner joint ventures, which are otherwise included in the TWE numbers). As pointed out above, these systems should not be attributed to AT&T because they do not give AT&T any ability to engage in vertical foreclosure or exercise monopsony power. In any event, the homes passed numbers should not be used as a measure because they do not take into account other MVPD competitors. As the Commission itself has proposed, horizontal concentration should be measured by MVPD subscribers, rather than homes passed.

34,760,000 cable homes passed,¹⁵² or approximately 34.8 percent¹⁵³ of all cable homes passed. When the Falcon, Bresnan and Cox transactions are completed, AT&T will pass 31,015,000 cable homes, or approximately 31 percent of all cable homes-passed.

As shown above, market shares of this size are no cause for concern because they do not give firms the ability to engage in vertical foreclosure or to exercise monopsony power. Such a conclusion is consistent with Congress' decision in the 1996 Act to raise the national broadcast limit from 25 percent to 35 percent.¹⁵⁴ And, because the broadcast rules still allow for a discount for UHF stations, the effective horizontal limit for broadcasters is well above 35 percent.¹⁵⁵

¹⁵² This includes all the homes passed for the AT&T and MediaOne cable systems identified in the charts contained in the Appendices, with the exception of Cablevision, the two AT&T-Time Warner joint ventures, and TWE. In addition, AT&T has subtracted from these numbers 1,155,000 homes passed to account for a reduction in homes passed resulting from the Comcast Exchange. As noted, Comcast also has a separate option to acquire additional cable systems from AT&T. If Comcast exercises that option, AT&T's percentage of cable homes passed will be even further reduced.

¹⁵³ This percentage is calculated by dividing 34,760,000 by 100,000,000 cable homes passed. However, the number may be substantially in excess of 100,000,000. Although a Kagan estimate of 95,520,000 total cable homes passed is sometimes cited, that figure is not appropriate for use in measuring an MSO's percentage of cable homes passed. TCI previously submitted to the Commission a separate study *performed by Kagan* indicating that the 95,520,000 estimate is unreliable and that the number could be well in excess of 100,000,000. See Letter from Michael H. Hammer, Esq., Willkie Farr & Gallagher, to William F. Caton, Secretary, Federal Communications Commission, *Ex Parte* Presentation, MM Docket No. 92-264 (Oct. 9, 1997). In fact, AT&T believes that given the significant changes in the MVPD marketplace over the past six years since the rule was adopted, the Commission could not now enforce a cable homes-passed test even if the suspended rules were reinstated. For these reasons, and the other reasons set out in TCI's prior comments, AT&T strongly endorses the Commission's proposal in the *Further NPRM* to use an MVPD subscriber test. See TCI Ownership Limit Comments at 56-65.

¹⁵⁴ 1996 Act, Pub. L. NO. 104-104, § 202(c)(1), 110 Stat. 56,111 (1996).

¹⁵⁵ 47 C.F.R. § 73.3555(e)(2)(i). For example, both Paxon and Fox have an effective national reach above 40 percent before applying the Commission's 50 percent discount for UHF stations.

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Moreover, the cable homes-passed measure completely ignores the considerable increase in the number of subscribers served by competing MVPDs, most importantly DBS, so that it vastly overstates an MSO's ability to engage in vertical foreclosure or to exercise monopsony power. Thus, if the Commission were to retain a homes-passed approach, it at the very least would have to modify its present formula to take into account the established competition from non-cable MVPDs, discussed above, both at present and going forward – *i.e.*, it would have to adopt a self-adjusting formula that would automatically recalculate an MSO's share as MVPD competition increases or decreases. Of course, the Commission could avoid the complexities of such a modified homes-passed approach by adopting the proposal in its *Further NPRM* to implement an MVPD subscriber formula.

In addition, whether measured on a subscriber or homes-passed basis, there is no concern that the Merger will reduce program diversity. First, as noted, AT&T post-Merger will not have sufficient size to enable it to foreclose programming services and thereby limit diversity. Second, the growth of DBS and other non-cable MVPDs provides programmers with additional viable distribution options. Third, as the Commission has found, independent programming sources have increased rapidly, and program diversity is at an all-time high.¹⁵⁶

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Moreover, because LMAs are not attributable, the effective national reach of certain broadcasters is in the 60 percent range. See TCI Ownership Limit Comments at 71-72.

¹⁵⁶ For example, the number of national satellite services has increased from 106 in 1994 to 245 in 1998. During this same time, the percentage of programmers vertically integrated with cable has declined from 53 percent to 39 percent. See *Fourth Annual Video Competition Report* ¶ 158; *Fifth Annual Video Competition Report* ¶ 159. As the Commission recently found, over 70 national programming services unaffiliated with cable operators were planned to be launched in the near future, whereas only five national programming services affiliated with a cable operator were planned for launch. See *Fifth Annual Video Competition Report* at Tables F-3 and F-4.